No. 561.

IN THE

Supreme Court of the United States

Steamtug S. & H. No. 2, Inc., as owner of the Steamtug "S. & H. No. 2",

Respondent-Libellant,

against

Steamtug "Lackawanna", MARGARET A. JAMISON, and MARTHA A. JAMISON, co-partners, doing business as Jay Street Terminal, claiming as charterers of tug "Lackawanna",

Claimants-Petitioners.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JAMES A. MARTIN,
Proctor for Respondent.

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent, Steamtug S. & H. No. 2, Inc., (Libelant below) in opposition to the petition for a writ of certiorari, respectfully shows to this Court:

The petition should be denied because it raises no novel question of law; it involves no substantial or disputed Federal question, and the determination sought to be reviewed is not inconsistent with the decisions of this Honorable Court, nor with the decisions of the Circuit Court of Appeals for the Second or other Circuits. The decision is but another in the long line of holdings that an overtaking vessel which has not signalled, is bound to hold

sufficiently under control to guard against expectable changes of course on the part of the vessel ahead. The latter is permitted to navigate under the assumption that the following vessel will comply with her legal obligation. This assumption prevails at least until such time as the vessel ahead has some reasonable ground to assume that the overtaking vessel has violated her obligation to such extent that she alone is not able to avoid collision.

POINT I.

The Circuit Court of Appeals properly held petitioners' vessel solely at fault.

Contrary to petitioners' argument, the decision under discussion is in no sense a departure from the rule, no where more rigidly enforced than in the Circuit Court of Appeals for the Second Circuit, that a vessel must maintain a proper and diligent lookout.

The case, as presented to the Circuit Court of Appeals, involved a question of fact as to whether the vessels were in an overtaking situation or in one of special circumstances. (cf. Opinion, R. pp. 137, 138.)

It does not appear that petitioners challenge the unfavorable determination made against them.

Having found as a fact that the petitioners' tug "Lackawanna" was moving up astern of respondent's tug, "S. & H. No. 2" from a direction more than 2 points abaft her beam, thus coming within the provisions of Article 24 of the Pilot Rules for Inland Waters (R. pp. 138, 139), the Circuit Court of Appeals held petitioners' tug solely at fault on the authority and reasoning of various of its previous decisions.

The arguments which petitioners now raise with respect to the duty of the lookout on the vessel ahead to look for vessels astern before the vessel ahead may make a normal and expectable swing to reach her pier (which respondent's vessel did here), were fully considered by the Circuit Court of Appeals in *The Industry*, 29 F. (2d) 29, Cert. denied 279 U. S. 837 and in the *M. J. Rudolph*, 292 Fed. 740, both cited in its opinion in this case.

In *The Industry, supra,* the Court held that in the absence of any signal from the vessel astern, evidencing a desire or intention on the part of the latter to pass her, the leading vessel may change her course so long as she has no reason to believe that the follower has violated its obligation to such an extent that the change which the leader is required to make to go about her business will involve risk of collision.

In that decision the Court followed the decision of this Court in *Thompson* v. *The Great Republic*, 23 Wall. 20, 23 L. Ed. 55, and pointed out that cases decided since *The Great Republic, supra,** which appeared to reach a different conclusion, were, on their own facts, proper exceptions to the rule.

In *The Industry* the Court recognized the difference in the duties of vessels where the following vessel has sounded signals indicating her intention to pass and where the following vessel has not sounded a signal thereby presumably evidencing an intention to remain astern, and sufficiently far astern, to adopt herself to a change of course by the vessel ahead.

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* These include *Long Island Railroad* v. *Killien*, 67 Fed. 365; *New York Central "No. 28"*, 258 Fed. 533; *The Transfer "No. 8"*, 25 F. (2d) 628; *Robinson* v. *Detroit etc. Co.*, 73 Fed. 883, cited by petitioner.

The situation in the case at bar was one in which petitioners' vessel, following respondent's, had not signalled an intention to pass.

To the reasoning of the Circuit Court of Appeals in *The Industry, supra,* may be added the thought that adoption of petitioners' argument that the vessel ahead should be under greater obligation, would constitute placing upon the leading vessel the duty of ascertaining, *at her peril,* the nature of the vessel astern, her ability to maneuver promptly, the vigilance of her officers and all other details which a navigator would be required to take into consideration before reaching a conclusion whether the following vessel was sufficiently far astern to avoid collision, if the leader should make such change of course as required to reach her destination. The difficulty of doing so at night, when little information as to the size and type of the following vessel can be learned from the appearance of her lights, is readily apparent.

In this case, as the Court held, the turn made by the respondent's tug "was a customary, if not necessary, step in approaching the foot of Roosevelt Street, and in no way excused the "Lackawanna" for crowding on the course of the "S. & H. No. 2" (R. p. 138). The master of petitioners' vessel admitted that there is nothing unusual about a tug proceeding up the East River on the flood tide, intending to land at a pier on the New York shore, turning as did respondent's tug; that she should do so, and that he would expect her to do so (R. p. 58).

Where the change of course by the leading vessel is totally unexpected, as in a situation where vessels are proceeding through a channel with neither piers or anchorages on either side, a different result is reached (cf. *Ocean SS. Co.* v. *U. S.,* 39 F. (2d) 553).

Thus, the cases do not turn on the duties of the lookout on the leading vessel. They rest on her right to assume, in the absence of notice to the contrary, that the following vessel, aware of her own capabilities, has taken such precaution that she can maneuver to avoid the changes of course the leader may reasonably be expected to make.

That a lookout astern is not required on a vessel moving ahead has long been the rule. *The Merrill C. Hart*, 188 Fed. 49.

Petitioners cite no case to the contrary.

Where the facts show and the Court finds that the following vessel has come up so close as to make danger of collision apparent, the leading vessel is at fault if she turns. *The K. V. Judge*, C. C. A. 2nd. 68 F. (2d) 710. In the instant case the Court held that there was nothing about the position of petitioners' vessel to indicate to respondent's tug that it would be unsafe to turn (R. p. 139).

Thus, it is self-evident that the case has been properly decided.

POINT II.

The decision is not in conflict with decisions of this Court or other Circuit Courts.

As previously stated, the decision under discussion follows *The Industry, supra*, which in turn follows the decision of this Court in *Thompson* v. *The Great Republic*, 23 Wall. 20, 23 L. Ed. 55. It is not in conflict with *The Illinois*, 103 U. S. 298, the *Ariadne*, 80 U. S. 475; *The New York*, 175 U. S. 187; *Robinson* v. *Detroit & C. Steam Nav.*

Co., 73 Fed. 883 or *Larsen* v. *Portland California Steamship Co.*, 66 F. (2d) 326, as petitioners maintain.

In *The Industry, supra,* the Court pointed out that *The Illinois, supra,* involved a case of a steamer overhauling a schooner which was close hauled. The steamer had turned to go under the schooner's stern when the latter unexpectedly broke her tack and came over into the steamer's course. The vessels were governed by different navigation rules than are applicable to the situation of two steam vessels as here involved.

The Ariadne, supra, involved a collision between a steamer and a sailing vessel not in an overtaking situation.

The vessels involved in *The New York, supra,* were not in an overtaking situation.

In *Larsen* v. *Portland-California Steamship Co., supra,* whistle signals had been sounded by the overtaking vessel, which was not so in the case at bar. Moreover, the leading vessel made an abrupt turn in a channel where a change of course was not to be anticipated. This case is in the same class with *Ocean SS. Co.* v. *U. S., supra,* wherein the Circuit Court of Appeals for the Second Circuit recognized the proposition that an unexpected turn, not in the ordinary course of customary navigation, is not to be anticipated by the following vessel.

In *Robinson* v. *Detroit & C. Steam Nav. Co., supra,* the vessel ahead made her change of course at a time when the following vessel was so close as to make it apparent to the leading vessel that her maneuver involved danger.

As already stated, the Circuit Court of Appeals has held in the instant case that there was nothing about the position of petitioners' vessel prior to the commencement of

the turn by respondent's tug, which would or should have made it apparent to those on board that the maneuver involved danger.

The record herein leads to the inescapable conclusion that this collision was due solely to the failure of the lookout on petitioners' tug to observe or to report to his captain what he observed with respect to the change of course by the "S. & H. No. 2" and that if petitioners' lookout had complied with the obligations imposed upon him by the decisions petitioners cite, this collision would not have occurred.

CONCLUSION.

The petition should be denied.

Respectfully submitted,

JAMES A. MARTIN,
Proctor for Respondent.